U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

Case No. 84-ERA-5

SHERRILL J. NOLDER,
Complainant

v.

RAYMOND KAISER ENGINEERS, INC.,
Respondent

FINAL DECISION AND ORDER

This is a proceeding arising under Section 210 of the Energy Reorganization Act of 1974, 42 U.S.C. § 5851.[1] At issue before me[2] is whether I should accept the recommendations of Administrative Law Judge Henry B. Lasky (ALJ) to dismiss with prejudice the complaint of Sherrill J. Nolder (Complainant) against Raymond Kaiser Engineers, Inc. (Respondent), alleging a violation of Section 5851[3] and to deny Complainant's Motion to Compel Production of Additional Documents and Respondent's Motion for Sanctions for Complainant's Cancellation of Her Deposition of Kaiser Employees.



The primary issue in this case is whether I should accept the ALJ's recommended decision to dismiss the complaint with prejudice. The chronology of events relating to this issue is as follows: The complaint was filed on March 15, 1983. In July 1983 Complainant also filed an action against Respondent in Superior Court of the State of California. On November 2, 1983, the judge of the California Superior Court, upon motion of Respondent, stayed the proceedings before him pending resolution of these federal proceedings. On December 22, the Wage and Hour Division, after investigation of the complaint in this case and in accordance with 29 CFR § 24.4, issued its notice of determination that adverse actions against Complainant by Respondent had violated Section 5851.

On December 28, Respondent requested a hearing and the parties began discovery proceedings. On March 5, 1984, Complainant requested, by letter, withdrawal of her complaint in order to pursue her claim in state court. Pursuant to an order by Judge Lasky and subsequent to Respondent's filing a Motion to Oppose Attempted Withdrawal of the Complaint or In the Alternative to Set Conditions for Withdrawal, Complainant filed a formal Motion to Withdraw Complaint/To obtain Voluntary Dismissal Without Prejudice on March 26, 1984. Judge Lasky held oral argument on the motions before him on April 5, 1984, and issued the Recommended Decision and Order (RDO) on May 25, 1984.

Complainant requested dismissal of her complaint without prejudice and upon no conditions. Respondent urged either that Complainant's motion for dismissal be denied or he complaint be dismissed with prejudice. Respondent further urged that, should the complaint be dismissed without prejudice, the dismissal should be conditioned on vacating the determination of the Wage and Hour Division and on Complainant's reimbursing Respondent for its expenses and attorney fees incurred in this proceeding.

Respondent contends that the Act and its implementing regulations at 29 CFR Part 24 do not allow withdrawal of a complaint without prejudice. Respondent initially argues, based on the Act, that the complaint should not be dismissed "unilaterally." Respondent cites the statement of Section 5851 that, unless the proceeding is settled, "[w]ithin ninety days of the receipt of such complaint the Secretary (of Labor) shall ... issue an order either providing the relief prescribed by Subparagraph (B) or denying the complaint' as mandating that, once a hearing is requested, the case must proceed to a hearing and issuance of an order on the merits of the complaint. Respondent limits what it considers a mandate of the Act to those cases in which

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a hearing has been requested; it concedes that Complainant could have unilaterly withdrawn her complaint while the Wage and Hour Division was investigating the claim.

If I accepted Respondent's argument based an the statute, I would have to rule that the Act does not allow for dismissal of the complaint (either with or without prejudice) after a hearing has been requested. However, I find nothing in the language of Section 5851 supportive of Respondent's position. The provision makes no mention of whether the case is at the investigatory or the adjudicatory stage of the proceedings. Indeed, were I to rule that Section 5851 controls when dismissals are allowable, I would have to rule that the *only* time a complaint may be withdrawn is when the case is settled. That, of course, I decline to do. I find nothing in the language of Section 5851 indicating that Congress intended to address when dismissals are permissible in an action brought under Section 5851. If Congress had intended a drastic juridical rule disallowing a complainant from withdrawing a complaint, voluntarily brought, Congress would have stated it. Therefore, I agree with Judge Lasky that the Act does not provide for "what is to be done when a complainant requests that her complaint be withdrawn or dismissed." (RDO at 3).[4]

Respondent's next argument is that, since the Act's implementing regulations only provide for dismissal for cause, *see* 29 CFR 524.5(e)(4),[5] dismissals without prejudice are not allowed. Firstly, this argument is inconsistent with Respondent's argument that Section 5851 does not allow for *any* dismissals at the hearing stage. In any case, the argument is not supportable. The mere silence of the regulations concerning dismissals other than dismissals for cause specified in the regulation does not preclude them. This is especially true since, as the ALJ ruled, the "Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges," 29 CFR Part 18, are applicable in any adjudicatory proceeding brought in the United States Department of Labor before an administrative law judge insofar as the procedures are not inconsistent with rules of special application such as Part 24. *See* 29 CFR § 18.1(a). Accordingly, where Part 24 is silent, the applicable regulation may be found in Part 18 or in the Rules of Civil Procedure for the District Courts (Federal Rules), since those rules are applicable "in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation." 29 CFR § 18.1(a). Respondent's argument is

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therefore rejected.[6]

The parties disagree on whether Subsection (ii) of 20 CFR § 24.5 (e) (4), *see* n. 5, is applicable.[7] The ALJ found the provision applicable in this case[8] but further ruled that, because the provision fails to "giv[e] any guidance on the standards to be applied in scrutinizing request for dismissal," RDO at 4, and 29 CFR Part 18 is similarly silent, he was required to refer to the Federal Rules. I agree with Judge Lasky that the Federal Rules apply here. I conclude that, inasmuch as the Federal Rules must be resorted to whether Subsection (ii) of 29 CFR § 24.5(e)(i) is applicable or not[9] and the applicable Federal Rule is not inconsistent with Subsection (ii) of Section 24.5(e)(4), I need not address whether Subsection (ii) is applicable.

Complainant argues that she is entitled to withdraw her complaint without prejudice and without an order by the ALJ because Respondent's had not filed an answer or a motion for summary judgment at the time she requested dismissal of her complaint. She relies on Federal Rule 41(a)(1), which allows a plaintiff to withdraw her complaint without court order prior to the defendant's filing its answer or a motion for summary judgment. FED. R. CIV. P. 41(a)(1). The ALJ ruled that Rule 41(a) (1) was not applicable because in these proceedings there is no "conventional civil law answers" at Respondent's disposal and Respondent had filed the equivalent of an answer by requesting a hearing. RDO at 4. I agree with the ALJ's ruling.

I also agree with Judge Lasky that Rule 41(a)(2) of the Federal Rules, is the pertinent regulation in this case. That Rule provides,

> By Order of Court. Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of

> the court and upon such terms and conditions as the court deems proper....unless otherwise specified in the order, dismissal under this paragraph is without prejudice.

FED. R. CIV. P. 41(a)(2). However, I hold that the ALJ erred in determining that under the rule the complaint should be dismissed with prejudice.

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The ALJ reasoned as follows:

> Rule 41 (a)(2) controls dismissal after an answer has been made. As noted in *Spencer v. Moore Business Forms*, (1980) 87 F.R.D. 118, a court's discretion under Rule 41(a)(2) is limited to making three determinations. First, it must decide whether to allow dismissal at all. If it allows dismissal, the court should next decide if dismissal should be with or without prejudice. Third, if dismissal without prejudice is allowed, the court must determine if any terms and conditions should be imposed. Guiding these determinations is the rule that dismissal without prejudice should be granted unless the defendant will suffer some legal harm, described variously:
> "'manifestly prejudicial to the defendant,' *Southern Maryland Agricultural Association of Prince George's County v. United States*, 12 F.R.D. 100, 101 (D. Md. 1954); 'substantial legal prejudice' to defendant, *Kennedy v. State Farm Mutual Automobile Insurance Company*, 46 F.R.D. 12, 14 (E.D. Ark. 1969); and the loss of any 'substantial right,' *Durham v. Florida East Coast Railway Company, supra*, 385 F.2d [336 (5th Cir. 1977)] at 368."
> *Spencer, supra*, at pp. 119-120; seel also *Hamilton v. Firestone Tire & Rubber Co.*, (9th Cir. 1982) 679 F.2d 143. The Complainant's desire to proceed with her parallel state court action is of no concern in this determination. (*Spencer, supra*, at p. 119, citing *Home Owners Loan Corporation v. Hoffman*, (8th Cir. 1983) 134 F.2d 314, 317-318. No reason has been advance against permitting dismissal and upon reflection none appears. It remains to be determined whether mere dismissal, dismissal with prejudice or dismissal upon condition is the most appropriate.

R.D.O. at 4-5. Upon further discussion, he concluded that dismissal without prejudice would legally harm Respondent and that therefore dismissal with prejudice was appropriate.

First, while *Spencer* did mandate that the adjudicator make the three inquiries Judge Lasky stated, *Spencer* makes

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clear that whether the defendant will be legally prejudiced must be considered when deciding if the complaint should be dismissed at all, not only when deciding whether a dismissal should be with or without prejudice. Since the ALJ found legal prejudice but failed to examine whether that prejudice warranted requiring Complaint to Proceed, he erred in stating, "No reason has been advanced against permitting dismissal and upon reflection none appears."

Accordingly, in order to decide whether dismissal should be denied or whether the complaint should be dismissed with prejudice, I must examine whether the ALJ additionally erred in determining that Respondent would suffer legal harm or prejudice. In deciding what is legal harm, I find instructive the following discussion of the United States Court of Appeals for the Ninth Circuit, the circuit in which this case arises:

> In ruling on a motion for voluntary dismissal, the District Count must consider whether the defendant will suffer some plain legal prejudice as a result of the dismissal. *Hoffman v. Alside, Inc.*, 596 F.2d 822, 823 (8th Cir. 1919); *Durham v. Florida East Coast Railway Co.*, 385 F.2d 366,368 (5th Cir. 1967). *See also Spencer v. Moore Business Forms, Inc.*, 87 F.R.D. 118, 119-20 (N.D.Ga. 1980). Plain legal prejudice, however, does not result simply when defendant faces the prospect of a second lawsuit or when plaintiff merely gains some tactical advantage. *Durham*, 385 F.2d at 369. *See* 5 J. Moore, J. Lucas & J. Wicker, Moore's Federal Practice ¶ 141.05[1], at 41-72 to -73 (2d ed. 1981). Appellant has alleged nothing to show that the District Court failed to consider whether plain legal prejudice might result or that the District Court abused its discretion in granting the dismissal. Appellant has not established plain legal prejudice merely by asserting that it had begun trial preparations. *See Durham*, 385 F.2d at 368-69. Indeed, the District Court addressed and disposed of the Issue of possible prejudice by awarding costs to defendant upon dismissal. *See* Excerpt at 139. Further, it is clear that the mere inconvenience of defending another lawsuit does not constitute plain legal prejudice. *See Durham*, 385 F.2d at 368; Moore's Federal Practice, *supra*.

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*Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). The cases that Judge Lasky cited also are helpful in determining whether legal prejudice should be found in this case. In *Spencer, supra*, dismissal without prejudice was disallowed only on those counts on which the court had already granted summary judgment for the defendant. In both *Southern Agricultural Association of Prince George's County, supra*, and *Kennedy, supra*, legal prejudice was found where dismissal would have allowed the plaintiffs to proceed in other courts under different laws that would have been more beneficial to the plaintiffs than the laws applicable to the proceedings in which the motions were brought.[10]

Further, the effect of dismissing a claim with prejudice must be recognized. In *Durham*, cited by Judge Lasky and in *Hamilton*, the Court of Appeals for the Fifth

Circuit held that the trial court had abused its discretion in dismissing the plaintiff's complaint with prejudice upon the plaintiff's motion to dismiss, made on the day of trial, for which counsel had gathered from great distances. The court stated that dismissal with prejudice

> is the most severe sanction that a court may apply and its use must be tempered by a careful exercise of judicial discretion.... The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff.

385 F-2d at 368. Dismissal with prejudice is such a severe sanction because, as Judge Lasky apparently failed to recognize, it bars a plaintiff from eve, Prosecuting another action based on the same cause, *Olsen v. Muskegan Piston Ring Co.*, 117 F.2d 163 (6th Cir. 1941); *i.e.*, the principle of *res judicata* apples. Dismissal of the complaint with prejudice in this case would not only prevent complainant from ever again bringing a complaint against Respondent under Section 5841;[11] the doctrine of *res judicata* would bar Complainant from ever bringing a claim of retaliation against Respondent based on these facts in state of any other court. *Compare Francisco Enterprises, Inc. v. Kirby*, 482 F.2d 481 (9th Cir. 1973). Respondent states the Complainant's pleadings in state court allege retalitory dismissal, constituting

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breach of contract, wrongful discharge and intentional infliction of emotional distress in Respondent's Memo at 3. If that is so, Respondent would prevail in state court in arguing that the claim of retaliation is *res judicata*.

In *Hamilton, supra*, the court recognized that they very purpose of Rule 41(a)(2) is to allow dismissal without prejudice. It further stated that under the rule that trial court may attach conditions to the dismissal in order to prevent prejudice to the defendant. 679 F.2d at 146.

Respondent urges,

> A dismissal of Nolder's complaint other than for cause would result in legal harm to Kaiser in at least three the disposition of Nolder's complaint ....Second, dismissal without prejudice would permit Nolder to pursue an identical retaliation claim against Kaiser in a forum with less expertise than DOL.... Third, dismissal without prejudice would leave standing the adverse preliminary finding of the Wage and Hour Division.

Respondent's Memo pp. 12-13. The ALJ essentially agreed with Respondent in concluding,

> Dismissal without prejudice will harm Respondent substantially by: (1) leaving intact the Wage and Hour Division's findings, the validity of which, Respondent has not yet been able to contest; (2) delaying resolution of the complaint, contrary to the intent of Congress and the Secretary of Labor, and to Respondent's detriment; and, (3) forcing Respondent to defend the claim in a forum with less congressionally recognized expertise than the Department of Labor possesses. As a complete adverse adjudication of the issues presented by Complainant's March 15, 1983 complaint alleging discriminatory employment practices on the part of Respondent in violation of 42 U.S.C. § 5851 of the Energy Reorganization Act, 42 U.S.C. §§ 5801, *et seq*. and the implementing regulations found at 29 CFR Part 24 dismissal with prejudice will protect Respondent from such harm. I conclude that dismissal with Prejudice is appropriate.

RDO at 8.

I find that both Respondent and Judge Lasky confused legal

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harm or prejudice with the type of prejudice to Respondent which could be rectified by attaching condition to allowing Complainant to withdraw without prejudice. None of the prejudice asserted by Respondent or found by the ALJ constitutes "legal" harm or prejudice. The ALJ, in protecting Respondent, failed to recognize that he was legally prejudicing Complainant by denying her the chance to proceed in any court on a charge that Respondent's adverse actions against her were recriminatory.

There is no support for Respondent's assertion and the ALJ's determination that, because the determination of the Wage and Hour Division would be left standing, dismissal of the complaint without prejudice would legally prejudice Respondent. When a cause of action is dismissed without prejudice pursuant to Rule 41(a)(2), the parties are in the same position as they would be had no suit ever been brought. *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959). Accordingly, which dismissal of the complaint without prejudice in this case, the determination of the Wage and Hour Division, based upon the complaint and made subsequent to the filing of the complaint, would be automatically vacated.[12]

The ALJ properly determined that mere delay did not constitute legal prejudice. However, he erroneously decided that respondent suffered harm since delay would put Respondent "at risk for an ever increasing amount of back pay that may be found due and owing to Defendant." RDO at 6. While a monetary loss due to delay can be the subject of a condition for dismissing a claim without prejudice, such a cost is not legal prejudice. *See Hamilton, supra*. Certainly the mere "risk" of such a cost, a cost which will not even arise unless Respondent loses the lawsuit, is not legal prejudice.

The ALJ also reasoned that "delay will hamper the gathering of evidence necessary for the defense as witnesses fade and documentary evidence is lost or misplaced." RDO at 6. Again the ALJ erred in finding legal prejudice, for delay and its attendant difficulties in gathering evidence results any time a first lawsuit is abandoned and the evidence is not gathered until a second lawsuit is tried. *See Hamilton, supra*. Further, there is no reason to believe that Respondent would be at any disadvantage in a second lawsuit, for any difficulties Respondent would encounter in gathering evidence would most likely also be encountered by Complainant. Accordingly, the ALJ's reasoning that delay prejudiced Respondent must be rejected.

The ALJ's determination that Respondent should not be

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forced to defend a claim in a forum with less expertise than the Department of Labor was based on the misconception that dismissal without prejudice would "permit Complainant to bring her 42 U.S.C. § 5851 claim in the state court." RDO at 7. A claim brought under Section 5851 can only be pursued in a proceeding in the Department of Labor, *see* 42 U.S.C. § 5851(b) and there is no indication in the record that Complainant was attempting to bring a cause of action under Section 5851 in state court. Further, I find no support for a determination that the state court would not have its own expertise on a case properly before it. Accordingly, the ALJ's ruling that lack of expertise of the state court prejudiced Respondent must also be rejected.[13]

I therefore hold that, because there is no support for the ALJ's finding legal prejudice, the Complainant must be allowed to withdraw her complaint without prejudice. However, whether condition's should be imposed must still be examined.

Because Judge Lasky recommended dismissal of the complaint with prejudice, he did not address Respondent's alternative request that dismissal without prejudice be conditioned on Complainant's reimbursing Respondent for its expenses and attorney fees incurred in this proceeding[14] or Respondent's motion that the ALJ impose sanctions against Complainant for her cancelling scheduled despositions due to Complainant's decision to withdraw her complaint. Respondent alleges that expense and attorney fees resulted from preparation for the cancelled depositions.

It is within the ALJ's discretion to condition dismissal of the complaint without prejudice on Complainant's reimbursing Respondent for expenses incurred in these proceedings. *See Hamilton, supra*. He could decide that Respondent is not entitled to the cost of work that will be useful in the state court proceeding. *See McLaughlin v. Cheshire*, 679 F.2d 855 (D.C. Cir. 1982). He may also condition the dismissal upon Complainant's agreement that all discovery in this case can be used freely in the state court proceeding. *See Tyco Laboratories, Inc. v. Koppers Co., Inc.*, 627 F.2d 54 (7th Cir. 1980) Because the setting of conditions is discretionary with the ALJ and because further evidence may be needed to determine what conditions are necessary to protect

Respondent's legitimate interests, I conclude that the case must be remanded for the ALJ to determine what conditions, if any, should be imposed on the Complainant for her to withdraw her complaint without prejudice.

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Finally, should the ALJ set conditions, he must provide the Complainant the option not to dismiss and to proceed, if she finds the conditions too onerous. *See* 9 Wright & Miller, Federal Practice & Procedure: Civil § 2366 at 183 (1971), and cases cited.[15]

The only remaining motion before me is Complainant's Motion to Compel Production of Additional Documents. The ALJ properly ruled that dismissal of the complaint renders it moot. However, on remand, should Complainant decide not to withdraw her complaint, the ALJ must address the motion.

Accordingly, the ALJ's Recommended Decision and Order dismissing the complaint with prejudice is not accepted and the case is remanded for further proceedings consistent with this decision.

&nbspBILL BROCK
Secretary of Labor

Dated: JUN 28 1985
Washington, D.C.

**[ENDNOTES]**

[1] Section 5851 prohibits an employer for discriminating against an employee because the employee has engaged in certain protected activity in the area of nuclear safety.

[2] This case is before me pusuant to 29 CFR § 24.6(b) for review and issuance of a final order.

[3] Complainant, who had been employed as a quality engineer by Respondent, alleged in her complaint discriminatory actions by Respondent, "including discharge and other actions that relate to compensation, terms, conditions and privileges of employment" in recrimination for records she wrote and discussions she had with the Nuclear Regulatory Commission that dealt with safety-related topics regarding the Zimmer Plant in Ohio.

[4] As an apparent corollary of it statutory argument, Respondent additionally argues that the government's interest in enforcement to assure compliance with federal nuclear safety requirements "also precludes Nolder from terminating this proceeding unilaterally." Respondent's Memorandum at 8. It is not clear from this statement whether Respondent is arguing that the governmental interest is served by disallowing a complainant from withdrawing a complaint or whether it is in the governmental interest to allow

complainant's withdrawal only for cause. In either case, no such requirement is stated in the Act. Nevertheless, I note that, rather than promoting compliance with federal nuclear safety requirements, it would be detrimental to the governmental interest to allow dismissal only for cause if dismissal for cause constitutes a "determination on the merits," as Respondent contends (Respondent's Memorandum at 8). Under Respondent's theory, since a dismissal for cause would preclude an employee from ever bringing in any other forum another suit against the employer based on the same cause such dismissal would free an employer from any penalty for retaliating against an employee for the employee's actions promoting nuclear safety.

[5] Section 24.5(e)(4) provides,

> Dismissal for cause. (i) The administrative law judge may, at the request of any party, or on his or her own motion, dismiss a claim
> (A) Upon the failure of the complainant or his or her representative to attend a hearing without good cause;
> (B) Upon the failure of the complainant to comply with a lawful order of the administrative law judge.
> (ii)In any case where a dismissal of a claims, defense, or party is sought, the administrative law judge shall issue an order to show cause why the dismissal should not be granted and afford all parties a reasonable time to respond to such order. After the time for response has expired, the administrative law judge shall take such action as is appropriate to rule on the dismissal, which may include an order dismissing the claim, defense or party.

[6] In its Reply Brief (at 3) Respondent made the argument, not addressed in either of its other briefs or in oral argument, that the complaint should be dismissed for cause pursuant to Section 24. 5 (e) (4) (i) (A), i.e. , that complainant's request to withdraw should be considered an advance notice that she intends not to attend the hearing. I find this argument without basis.

[7] Complainant argues that Subsection (ii) of 20 CFR § 24.5 (e) (4) is applicable only where a claim is dismissed pursuant to Subsection (i) and that therefore no part of 20 CFR § 24. 5 (e) (4) applies in this case. Respondent argues that Subsection (ii) of 20 CFR § 24. 5 (e) (4) is applicable for dismissals for cause not covered by Subsection (i) of the regulation and that Subsection (ii) is applicable in this case.

[8]Judge Lasky noted, "Despite the fact that an order to show cause was not issued, the parties were afforded the same opportunity to brief and argue the merits of Complainant's motion at the April 5 hearing that they would have been afforded if the matter were heard upon an order to show cause," RDO at 3, n.2. If 20 CFR § 24.5(e)(4)(ii) is applicable, I agree with Judge Lasky that its requirements were complied with.

[9] If 20 CFR § 24.5(e)(4)(ii) is not applicable, resort must be made to the Federal Rules since 29 CFR Part 13 is silent on the issue. If subsection (ii) is applicable, I agree with the ALJ's reasoning and ruling that resort must be made to the Federal Rules.

[10] In each case the judge, upon finding legal prejudice, did not dismiss with prejudice but denied the plaintiff's motion to dismiss, requiring the plaintiff to proceed.

[11] Complainant would be prevented from bringing a new cause of action based on the same facts under Section 5851 were the complaint before me dismissed without prejudice. A dismissal without prejudice does not toll a statute of limitations. *See* 9 Wright & Miller, Federal Practice and Procedure: Civil § 2367 at 187 (1971), and cases cited therein. The thirty days from occurrence of a violation allowed by 42 U.S.C. § 5851(b)(1), *see also* 29 C.F.R. 24.3(b), for filling a complaint has passed. Therefore, complainant could not file a new complaint.

[12] Inasmuch As the ALJ did vacate the determination of the Wage and Hour Division, I find it anomalous that he concluded that the determination of the Wage and Hour Division remained intact and legally harmed Respondent. In requesting alternatively that vacation of the determination be a condition for allowing dismissal without prejudice, Respondent apparently recognized that, should the determination not be vacated automatically, it nevertheless could be vacated by order of the ALJ and that any prejudice to Respondent could be removed. In its memorandum Respondent also conceded that the determination of the Wage and Hour Division would have no "formal effect" arguing only that it would bear a "stigma" and that it would be "vulnerable to the Complainant's improper efforts to use such a finding in other proceedings against the respondent." Respondent's Memo at 8. This concession is patently inconsistent with Respondent's assertion that the existence of the Wage and Hour determination constitutes legal harm warranting dismissal of the complaint for cause or with prejudice.

[13] Respondent makes no contention that the state laws on which the state action would be tried and decided are more beneficial to Complainant than Section 5851. Establishing, that Respondent would be detrimentally affected by the state laws would constitute legal prejudice. *Durham, supra*.

[14] The other condition Respondent requested, that the Wage and Hour determination be vacated, is moot for the reasons given.

[15] Only if Complainant accept the dismissal on the conditions set by the ALJ but does not meet the conditions may the ALJ dismiss the complaint with prejudice. Davis v. McLaughlin, 326 F.2d 881 (9th Cir. 1964), *cert. denied*, 379 U.S. 833 (1964).